

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-218133

DATE: April 22, 1985

MATTER OF: John C. Kohler Co.

DIGEST:

1. An invitation for bids may be canceled after bid opening and the exposure of bid prices when a compelling reason exists for doing so. A significant reduction in the agency's requirements under a procurement after bid opening constitutes such a reason.
2. Even assuming original basis for cancellation was erroneous or inadequate, a subsequently enunciated basis, which would have supported cancellation had it been advanced originally, is acceptable.
3. There is no authority to permit the low bidder under an invitation for bids properly canceled due to a significant reduction in requirements an exclusive opportunity to revise its bid to meet the changed needs of the agency without resolicitation.
4. Claim for bid preparation costs is denied where claimant has not shown that the agency abused its discretion in canceling solicitation.
5. Claim for costs of filing and pursuing protest, including attorney's fees, is denied where cancellation of solicitation was proper.

John C. Kohler Co. (Kohler) protests the Department of the Air Force decision to cancel invitation for bids (IFB) No. F28609-84-B-0022 after the opening of bids.

We deny the protest.

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The invitation, the second step of a two-step formally advertised procurement, solicited bids for the replacement of four boilers at the central heating plant at McGuire Air Force Base, New Jersey. Kohler submitted the low bid of \$3,675,000. The contracting officer, however, canceled the solicitation because the project was "no longer needed because of heating load reduction."

Kohler claims that it was given a variety of reasons other than the reduction in heating needs for the cancellation, for example, the agency's desire to use an alternative type of heating system called cogeneration, and the agency's concern that Kohler's bid price was excessive. Kohler asserts that the real reason for the cancellation was that the Air Force made budgeting errors in planning this procurement. It contends that the cost of the boilers alone exceeds the Air Force estimate of \$1,976,000 for the entire project and the Air Force erroneously excluded several significant items from its estimate of the cost of replacing the boilers. Kohler further contends that it was only after the requiring activity learned that its estimate was so far below the low bid that the activity considered cancellation of the solicitation. Kohler believes that these budgetary errors were not a sufficient basis for canceling the solicitation after bid opening.

The Air Force acknowledges that it omitted some cost elements from its estimate, but states that the sole basis for the cancellation was that, since the issuance of the solicitation, the agency's boiler plant capacity needs had been reduced significantly. The Air Force states that the installation of 70 gas-fired boilers to provide electricity and hot water for a section of multi-family housing units on the base took those units off the central heating plant and reduced the heating demands on the plant. According to the Air Force, the total usable capacity of the central heating plant is 239 million British Thermal Units (BTUs) per hour but the actual load seldom exceeds 160 million BTUs per hour, so that the present plant is adequate to handle the current heating loads without an overhaul of all four boilers. It further states that the question of how the current and future heating and power demands at McGuire AFB should be met is the subject of more comprehensive ongoing studies. The agency concludes that it canceled the solicitation due to the known load reduction and the need to review what additional base energy requirements actually

existed. The protester does not dispute that the Air Force's central heating plant requirements have in fact been reduced.

Because of the potential adverse impact on the competitive bidding system of canceling an IFB after bid prices have been exposed, the contracting officer must have a compelling reason to cancel an IFB. Federal Acquisition Regulation, 48 C.F.R. § 14.404-1(a)(1) (1984). A change in an agency's requirements after the opening of bids so that the solicitation no longer properly reflects the agency's minimum needs constitutes such a compelling reason. Tecom, Inc., B-213815.2, Aug. 6, 1984, 84-2 C.P.D. ¶ 152. We will not question the contracting officer's decision to cancel as long as it reflects a reasoned judgment based upon the investigation and evaluation of information reasonably available at the time the decision is made. See Dyneteria, Inc., B-211525.2, Oct. 31, 1984, 84-2 C.P.D. ¶ 484.

At the time the solicitation was issued, the Air Force had an apparent need for the replacement of all four boilers in the central heating plant because the boilers were deteriorating, but, at the time the decision to cancel the solicitation was made, the heating loads had been significantly reduced by the installation of the alternate source of electricity and hot water in the section of multi-family housing units. This placed less stress on the existing central heating plant, and obviated the need for replacement of all four boilers. Since the solicitation no longer accurately represented the Air Force's needs, we conclude that the contracting officer's decision to cancel the IFB was not improper.

To the extent that the bases originally advanced by the Air Force for the cancellation were erroneous or inadequate, as Kohler suggests, we point out that a subsequently enunciated basis for cancellation, which would have supported cancellation had it been advanced originally, is acceptable. General Aero Products Corp., B-213541, Sept. 18, 1984, 84-2 C.P.D. ¶ 310. Therefore, whether the Air Force might have indicated initially is of no consequence.

Kohler also asserts that two boilers on the central heating plant will still need to be replaced and that the agency should negotiate with it for this contract. We do not believe that awarding Kohler a contract for the replacement of two boilers would be appropriate because it would be prejudicial to other bidders. To permit Kohler, simply because it submitted the low bid on the canceled

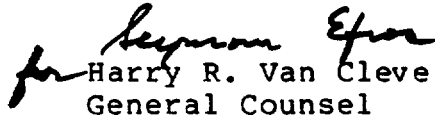
invitation, an exclusive opportunity to revise its bid to meet the materially changed requirements would be improper. General Aero Products Corp., B-213541, supra.

Finally, Kohler requests that it be reimbursed for its bid preparation costs and its costs of pursuing this protest, including attorney's fees. Kohler asserts that the work on the project for the section of multi-family housing units had begun when this solicitation was issued and the Air Force knew or should have known that this project would reduce its requirements. It contends that the Air Force acted in an arbitrary and capricious manner by ignoring the impact the other project would have on its requirements for boiler replacement when it issued this solicitation. We note in this connection that the Air Force advises that it did not remove the housing units from the central heating plant system until November and December 1984 and January 1985, and thus it advises it could not assess the effect of this change until this time period. The decision to cancel the solicitation was made in January after the reduction in the central plant heating load was accomplished.

A prerequisite to entitlement to bid preparation costs as a result of cancellation of a solicitation is a showing that the agency's actions with respect to the claimant's bid were arbitrary and capricious. M & M Services, Inc., B-218029, Mar. 27, 1985, 85-1 C.P.D. ¶ _____. Here, we have concluded that cancellation constituted a reasonable exercise of discretion by the Air Force. Further, although the Air Force concedes that it knew or should have known of the project for the multi-family housing units when it issued the solicitation, the Air Force states it did not know the precise impact of the project on its central heating plant. At best, this oversight merely indicates some lack of care in the Air Force's planning. In our view, the Air Force action did not constitute gross negligence nor was the decision to issue the solicitation irrational or totally lacking in reason. The mere failure to exercise due diligence does not rise to the level of arbitrary or capricious conduct which warrants the recovery of bid preparation costs. M & M Services Inc., B-218029, supra.

With respect to the costs of pursuing the protest, we will only allow the recovery of such costs where the contracting officer has unreasonably excluded the protester from the procurement and where other remedies listed in our Bid Protest Regulations, 4 C.F.R. § 21.6(a) (1985), are unavailable. 4 C.F.R. § 21.6(e). Since we have determined that here the cancellation was proper, Kohler's does not qualify for the reimbursement of such costs.

We deny the protest and claim for bid preparation and protest filing costs.


for Harry R. Van Cleve
General Counsel